

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

No. 74-16844 No. 74-2018

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In the Matter of:

LEHIGH AND HUDSON RIVER RAILWAY COMPANY,

Debtor,

COMMONWEALTH OF PENNSYLVANIA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES OF AMERICA, APPELLEE

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INDEX

	<u>Page</u>
Statement of the Issues Presented -----	1
Statement of the Case -----	2
Constitution and Statutes Involved -----	7
Summary of Argument -----	9
Argument -----	11
I. THE COURT OF APPEALS LACKS JURISDICTION IN THIS CASE. -----	11
II. PENNSYLVANIA IS BOUND BY THE SPECIAL COURT'S DECISION ON THE CONSTITUTIONAL JURISDICTIONAL ISSUES. -----	16
III. THE 120-DAY DECISION UNDER §207(b) IS NOT APPEALABLE. -----	18
IV. THE LITIGATION UNDER SECTION 207(b) PRESENTS A CASE OR CONTROVERSY. -----	19
V. THE SECTION 207(b) "120-DAY" DETERMINATIONS ARE JUDICIAL IN NATURE. -----	23
VI. PENNSYLVANIA LACKS STANDING TO CHALLENGE THE DISTRICT COURT'S DECISION, WHICH IN ANY EVENT IS NOW MOOT. -----	28
Conclusion -----	30
Addenda -----	31

Pennsylvania's Response To Notice To Show Cause
Pennsylvania's Brief As Appellee in the Special Court
Extracts from the oral arguments of the Special Court

Citations

Cases:

<u>Aetna Life Ins. Co. v. Haworth</u> , 300 U.S. 277 (1937) -----	19, 22, 23, 30
<u>Allegheny Corp. v. Kirby</u> , 340 F.2d 311 (2d Cir. 1965)(en banc), cert. dismissed as improvidently granted, 384 U.S. 28 (1966) -----	17
<u>American Surety Co. v. Baldwin</u> , 287 U.S. 156 (1932) -----	17, 18
<u>Anaconda Co. v. Ruckelshaus</u> , 482 F.2d 1301 (10th Cir. 1973) -----	11

Cases continued

Page

<u>Burco, Inc. v. Whitworth</u> , 81 F.2d 721 (4th Cir.), <u>cert. den.</u> , 297 U.S. 724 (1936)	23
<u>Chapman v. Meier</u> , U.S. ___, 43 U.S.L.W. 4199 (Jan. 27, 1975). -----	17
<u>Chicago & Southern Airlines v. Waterman</u> <u>S.S. Corp.</u> , 333 U.S. 103 (1948)-----	21, 24, 28
<u>Coffman v. Breeze Corp.</u> , 323 U.S. 316 (1945)-----	20
<u>Cory v. Curtis</u> , 3 How. 235 (1845) -----	11
<u>DeFunis v. Odegaard</u> , 416 U.S. 312 (1974)-----	20, 29
<u>Diffenderfer v. Central Baptist Church</u> , 404 U.S. 412 (1972) -----	29
<u>Dunn v. Blumstein</u> , 405 U.S. 330 (1972) -----	17
<u>Evers v. Watson</u> , 156 U.S. 527 (1895) -----	17
<u>Ex Parte Bakelite Corp.</u> , 279 U.S. 438 (1933) -----	24
<u>Federal Radio Comm. v. General Elec. Co.</u> , 281 U.S. 464 -----	27
<u>Fidelity National Bank v. Swope</u> , 274 U.S. 123 (1927) -----	20
<u>Flast v. Cohen</u> , 392 U.S. 83 (1968) -----	19, 21
<u>Fusari v. Steinberg</u> , U.S. ___, 43 U.S.L.W. 4121 (Jan. 14, 1975) -----	29
<u>Getty Oil Co. v. Ruckelshaus</u> , 467 F.2d 349 (3rd Cir. 1972), <u>cert. den.</u> , 409 U.S. 1125 (1973)	11
<u>Gilligan v. Morgan</u> , 413 U.S. 1 (1973) -----	20
<u>Golden v. Zwickler</u> , 394 U.S. 103 (1969)-----	20, 29
<u>Goosby v. Osser</u> , 409 U.S. 512 (1973) -----	20
<u>Gordon v. United States</u> , 117 U.S. 697 (1864) -----	24, 27
<u>Hayburn's Case</u> , 2 Dall. 409 (1792) -----	24
<u>In re Boston & Maine Corp.</u> , 455 F.2d 1205 (1st Cir. 1972) -----	25, 26
<u>In re Debs</u> , 158 U.S. 564 (1885) -----	27

Cases continued

Page

<u>In re Lehigh & Hudson River Ry. Co.</u> , 374 F. Supp. 4 (S.D. N.Y. 1974) -----	1, 4
<u>In re Lehigh & Hudson River Ry. Co.</u> , 377 F. Supp. 475 (S.D. N.Y. 1974) reversed, 384 F. Supp. 895 (Sp. Ct. RRRA 1974) cert. den., ___ U.S. ___ (Feb. 18, 1975) -----	1, 2, 6
<u>In re New York, New Haven & Hartford R.R. Co.</u> , 289 F. Supp. 451 (D. Conn. 1968)-----	21, 25
<u>In re Penn Central Transportation Co.</u> , 382 F. Supp. 453 (Sp. Ct. RRRA 1974) -----	5, 6, 18
<u>In re Penn Central Transportation Co.</u> , 384 F. Supp. 895 (Sp. Ct. RRRA, 1974), cert. den., ___ U.S. ___ (Feb. 18, 1975) -----	2,3,7,19,21,22,23,24
<u>In re Penn Central Transportation Co.</u> , 494 F.2d 270 (3rd Cir. 1974), cert. den., ___ U.S. ___ (Oct. 15, 1974) -----	25
<u>In re Smith</u> , ___ U.S. ___ (N. 74-657) -----	7
<u>Jackson v. Irving Trust Co.</u> , 211 U.S. 494 (1941)	17
<u>Keller v. Potomac Electric Power Co.</u> , 261 U.S. 428 (1923) -----	24, 27
<u>Laird v. Tatum</u> , 408 U.S. 1 (1972) -----	20
<u>Linda R.S. v. Richard D.</u> , 410 U.S. 614 (1973) ----	29
<u>Lockerty v. Phillips</u> , 319 U.S. 182 (1943) -----	11
<u>Maryland Casualty Co. v. Pacific Co.</u> , 312 U.S. 270 (1941) -----	20, 29
<u>McCormick v. Sullivant</u> , 10 Wheat. 192, 23 U.S. 85 (1825) -----	17
<u>McGrath v. Kristensen</u> , 340 U.S. 162 (1950) -----	24
<u>Moore v. Charlotte-Mecklenburg Board of Education</u> , 402 U.S. 47 (1971) -----	17, 20, 24
<u>Municipal Intervenors Group v. Federal Power Commission</u> , 473 F.2d 84 (D.C. Cir. 1972)----	11, 12, 13
<u>Muskrat v. United States</u> , 219 U.S. 346 (1911) ----	24
<u>Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace</u> , 288 U.S. 243 (1933) -----	20, 22

Cases continued

Page

<u>New Haven Inclusion Cases</u> , 399 U.S. 392 (1970) ---	18
<u>Northern Pacific R.R. Co. v. Boyd</u> , 228 U.S. 482 (1913) -----	24
<u>O'Shea v. Littleton</u> , 414 U.S. 488 (1974) -----	29
<u>Postum Cereal Co. v. California Fig Nut Co.</u> , 272 U.S. 693 (1927) -----	24
<u>Public Service Comm. of Utah v. Wycoff Co.</u> , 344 U.S. 237 (1952) -----	22
<u>Regional Rail Reorganization Act Cases</u> , ___ U.S. ___, 43 U.S.L.W. 4031 (Dec. 16, 1974) -----	3, 17
<u>Richardson v. Ramirez</u> , 418 U.S. 24 (1974) -----	17
<u>Roe v. Wade</u> , 410 U.S. 113 (1973) -----	20, 29
<u>Securities and Exchange Commission v. Medical Committee</u> , 404 U.S. 403 (1972) -----	29
<u>Sosna v. Iowa</u> , ___ U.S. ___, 43 U.S.L.W. 4125 (Jan. 14, 1975) -----	17, 20, 29
<u>Steffel v. Thompson</u> , 415 U.S. 452 (1974) -----	20
<u>Super Tire Engineering Co. v. McCorkle</u> , 416 U.S. 312 (1974) -----	20
<u>Texas v. United States</u> , 292 U.S. 522 (1934) -----	28
<u>UMC Industries v. Seaborg</u> , 439 F.2d 953 (9th Cir. 1971) -----	11
<u>United Public Workers v. Mitchell</u> , 330 U.S. 75 (1947) -----	29
<u>United States v. Ferreira</u> , 13 How. 40 (1851) -----	24
<u>United States v. Thirty-Seven Photographs</u> , 402 U.S. 363 (1971) -----	15
<u>United States v. United Steelworkers of America</u> , 202 F.2d 132 (2d Cir. 1953), <u>cert. den.</u> , 344 U.S. (1953) -----	26
<u>United Steelworkers of America v. United States</u> , 361 U.S. 39 (1959) -----	26
<u>Whitney Bank v. New Orleans Bank</u> , 379 U.S. 411 (1965) --	11

Cases continued

	<u>Page</u>
<u>Williams v. North Carolina</u> , 325 U.S. 225 (1945)---	17
<u>Williams v. United States</u> , 289 U.S. 554 (1933)----	24
<u>Wright v. Vinton Branch Bank</u> , 300 U.S. 440 (1936)--	22

Constitution and Statutes:

United States Constitution, Article III	11, 17
Bankruptcy Act	
Section 24, 11 U.S.C. 47 -----	13
Section 77, 11 U.S.C. 205 -----	passim
Section 77(c)(6), 11 U.S.C. 205(c)(6) -----	25
Section 77(g), 11 U.S.C. 205(g) -----	24
Section 77(o), 11 U.S.C. 205(o) -----	25
Economic Stabilization Act of 1970,	
12 U.S.C. 1904 -----	12
Frazier-Lemke Act of 1935, 49 Stat. 943-945 -----	22
Interstate Commerce Act, Section 5 (49 U.S.C. 5)--	27
Judicial Code, 28 U.S.C. 1292 -----	14
Labor Management Relations Act, Section 208	
(29 U.S.C. 178) -----	26
Natural Gas Act	
15 U.S.C. 717c(e) -----	11
15 U.S.C. 717r(b) -----	12
Public Utility Holding Company Act of 1935,	
15 U.S.C. 79 et seq. -----	23
Regional Rail Reorganization Act of 1973,	
45 U.S.C. 701 et seq. -----	passim
Section 101(a)(3), 45 U.S.C. 101(a)(3) -----	27
Section 205, 45 U.S.C. 715 -----	3
Section 207(b), 45 U.S.C. 717(b) -----	1, passim
Section 209, 45 U.S.C. 719 -----	2
Section 303, 45 U.S.C. 743 -----	4

Miscellaneous:

Congressional Record (Daily Version),	
December 21, 1973 -----	15
H.R. 9142, 93rd Cong., 1st Sess. -----	14

Miscellaneous continued

	<u>Page</u>
H. Rep. 93-620, 93rd Cong., 1st Sess. -----	14
Moore's Federal Practice (2d Ed.), Vol. 9, ¶110.01 -----	11
Vol. 1B, ¶10.405[5] -----	17, 18
S. Rep. 93-601, 93rd Cong., 1st Sess. -----	14
S. Rep. 93-664, 93rd Cong., 1st Sess. -----	14
Wright, Federal Courts (2d Ed.) -----	19

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LEHIGH AND HUDSON RIVER RAILWAY COMPANY,

Debtor,

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Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THE UNITED STATES OF AMERICA, APPELLEE

STATEMENT OF THE ISSUES PRESENTED

The Commonwealth of Pennsylvania appeals from two decisions of Judge Robert J. Ward, United States District Court for the Southern District of New York, acting as reorganization judge for the Lehigh & Hudson River Railway Company under Section 77 of the Bankruptcy Act, 11 U.S.C. 205, and the Regional Rail Reorganization Act of 1973, 45 U.S.C. 701 et seq. The first decision, reported at 374 F. Supp. 4, was made pursuant to the first sentence of Section 207(b) of the RRRA, 45 U.S.C. 717(b), and determined that the L&HR "cannot be reorganized on an income basis within a reasonable time and that the public interest requires reorganization under the [RRRA]." 374 F. Supp. at 8 (hereinafter the 120-day decision). The second decision, reported at 377 F. Supp. 475, was made pursuant to the second sentence of Section 207(b), and determined that the

L&HR would not reorganize subject to the RRRA because "the Act does not provide a process of reorganization which is fair and equitable to the estate of the railroad." 377 F. Supp. at 476 (hereinafter the 180-day decision). On September 30, 1974, the Special Court, RRRA reversed the 180-day decision and remanded for the entry of an order providing for reorganization under the RRRA. In re Penn Central Transportation Co., 384 F. Supp. 895, stay vacated, January 20, 1975, cert. den. ____ U.S. ____ (February 18, 1975).

The issues raised by this appeal are:

1. When Section 207(b) specifically limits appeals from orders "made under this section * * * only to the Special Court" created under Section 209 of the RRRA, does this court lack jurisdiction to consider such appeals?
2. On principles of judicial finality does the Special Court's decision (384 F. Supp. 895) preclude Pennsylvania, an active participant in the Special Court cases, from relitigating here the jurisdictional contentions decided by the Special Court?
3. Is the 120-day decision appealable?
4. Does the first sentence of Section 207(b) of the RRRA violate Article III of the Constitution?
5. Does Pennsylvania lack standing to attack the decisions of the reorganization court?
6. Are these appeals now moot?

STATEMENT OF THE CASE

On January 2, 1974, the Regional Rail Reorganization Act of 1973 was enacted. The Act represents an attempt to solve the

nagging problem of bankrupt Northeastern railroads. Briefly, the Act creates the United States Railway Association, a government agency, charged with the task of designing a profitable privately-owned railroad system for the Northeast out of the properties of the bankrupt railroads. The Act also creates a private for-profit corporation, the Consolidated Rail Corporation (Conrail) to own and operate this system. The provisions of the Act are discussed in detail in Regional Rail Reorganization Act Cases, 43 U.S.L.W. 4031 (Dec. 16, 1974) and In re Penn Central Transportation Co., supra, 384 F. Supp. at 906-912.

Congress did not require all bankrupt railroads in the Northeast to reorganize under the Act. Instead, Section 207(b) requires each reorganization judge to decide within 120 days of enactment:

"Whether the railroad is reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by reorganization under this Act."

If the judge decides that the debtor railroad can't or shouldn't in the public interest reorganize under Section 77 of the Bankruptcy Act, then within 180 days of enactment he must order the reorganization of the railroad to take place under the Act unless he finds that the Act does not provide a process which is fair and equitable to the debtor's estate, in which case he must dismiss the reorganization proceeding.^{1/} Section 207(b) limits review of decisions made under Section 207(b) to a Special Court of three judges, designated by the Judicial Panel on Multidistrict Litigation, under Section 209

^{1/} Actually, Section 207(b) requires this decision to be made within 50 days of the release of a report by the Rail Services Planning Office under Section 205 of the Act. But under Section 205, the report of the Office is due, and actually was published, 120 days after enactment. Thus, the two decisions under Section 207(b) have become known as the 120-day and 180-day decisions.

of the Act. The Special Court, in addition to exercising appellate jurisdiction under Section 207(b), is also empowered to conduct the litigation under Section 303 of the RRRA to determine whether the consideration exchanged under the RRRA final system plan for the rail properties of the bankrupt railroads is fair and equitable. On March 1, 1974, the Judicial Panel on Multidistrict Litigation designated Judge Henry Friendly of this court, Judge Carl McGowan of the Court of Appeals for the District of Columbia Circuit, and Senior District Judge Roszel Thomsen of the District of Maryland to sit in the District of Columbia as the Special Court.

Pursuant to the mandate of Section 207(b), Judge Ward, as reorganization judge for the Lehigh & Hudson River, held a hearing on April 1, 1974 in order to determine whether the L&HR could and should reorganize on an income basis within a reasonable time under Section 77 of the Bankruptcy Act. At this hearing, Pennsylvania contended that the L&HR was indeed reorganizable on an income basis under Section 77 within a reasonable time and that the public interest would be better served by this type of reorganization. Pennsylvania raised the jurisdictional issues presented on this appeal but stipulated that these contentions need not be argued or decided, without prejudice to their being raised during the 180-day hearings under Section 207(b). On April 24, 1974, Judge Ward entered an opinion and order determining that the L&HR was not reorganizable as an operating railroad on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and that the public interest would not be served by continuing this type of reorganization. 374 F. Supp. at 8.

Pennsylvania appealed the 120-day decision to this court and to the RRRRA Special Court. Pursuant to Rule 13 of the Special Court rules, Pennsylvania was required to show cause why its appeal of the 120-day decision should not be dismissed for lack of jurisdiction. In its response to the notice to show cause, Pennsylvania raised its contention that "the reorganization court's courts [sic] for the L&HR, CNJ, RDG and LV are without jurisdiction to make the findings of Section 207(b)."^{2/} The Special Court dismissed Pennsylvania's appeals from the 120-day orders in the L&HR and other reorganization proceedings for lack of jurisdiction. In re Penn Central Transportation Co., 382 F. Supp. 453 (1974). The Special Court held that Congress intended a single appeal of the 120-day and 180-day decisions from the 180-day orders under Section 207(b) of the Act.

Pursuant to the mandate of the second sentence of Section 207(b), Judge Ward held a hearing on June 6, 1974, to determine whether the L&HR should reorganize subject to the RRRRA. At this hearing, Pennsylvania opposed L&HR's reorganization under the RRRRA. Pennsylvania again argued that the reorganization court was without constitutional jurisdiction to make any findings under Section 207(b). On July 1, 1974, Judge Ward entered an opinion and order determining that the L&HR should not reorganize pursuant to the RRRRA because the Act did not provide a process of reorganization

^{2/} Pennsylvania's Response To Notice To Show Cause, at 4. A copy of this document is attached in the Addenda.

which is fair and equitable to the estate of the railroad. 377 F. Supp. at 476. The court did not rule on Pennsylvania's jurisdictional objections, but effectively rejected them by making Section 207(b) determinations.

Pennsylvania appealed the July 1, 1974 decision to this court, but not to the Special Court. The United States, however, and other governmental parties did appeal the 180-day decision to the Special Court. In these appellate proceedings, Pennsylvania participated fully as an appellee. However, Pennsylvania took the position that L&HR should not be reorganized under the RRRA, not because of the Act's alleged unfairness to creditors, but because the L&HR was indeed reorganizable under Section 77 and the public interest would be better served by this type of reorganization.^{3/} In its brief as appellee in the Special Court Pennsylvania attempted, unsuccessfully, as we argue below, to reserve for the present appeal its arguments that the reorganization court and the Special Court lack jurisdiction to make determinations under Section 207(b). However, Pennsylvania explicitly raised these contentions not only in its Special Court brief, e.g. at 5, but also during oral argument in the consolidated appeals.^{4/} These issues were fully briefed and argued to the Special Court by other parties to the consolidated appeals.

On September 30, 1974, the Special Court reversed the July 1, 1974, decision of Judge Ward in the Lehigh & Hudson River case. In re Penn Central Transportation Co., supra. In its opinion, the

^{3/} A copy of Pennsylvania's brief as appellee in the Special Court is attached hereto in the Addenda.

^{4/} Extracts from the oral arguments are reprinted in the Addenda.

Special Court decided the jurisdictional issues presented here. See Opinion of Judge Friendly, 384 F. Supp. at 913-916; Opinion of Judge Thomsen, 384 F. Supp. at 985-986, 989-990. The Special Court squarely rejected each and every contention raised here by the Commonwealth. However, the Special Court stayed the effective date of its order pending the decision of the Supreme Court in certain appeals dealing with the constitutionality of the RRRRA. These appeals were decided on December 16, 1974, sub. nom. Regional Rail Reorganization Act Cases, supra. The Supreme Court reversed the decision of a three-judge district court which had declared the RRRRA unconstitutional and instead upheld the Act's constitutionality. On January 20, 1975, the Special Court vacated the stay of its September 30, 1974 order.^{5/}

CONSTITUTION AND STATUTES INVOLVED

Article III, §2 of the Constitution provides as follows, in material part:

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States Citizens or Subjects."

^{5/} On February 18, 1975, the Supreme Court denied a petition for a writ of common law certiorari to review the Special Court's decision. In re Smith, ___ U.S. ___ (No. 74-657).

Section 207(b) of the Regional Rail Reorganization Act of 1973 provides as follows:

"(b) Approval.—Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act. An appeal from an order made under this section may be made only to the special court. Appeal to the special court shall be taken within 10 days following entry of an order pursuant to this subsection, and the special court shall complete its review and render its decision within 80 days after such appeal is taken. There shall be no review of the decision of the special court."

SUMMARY OF ARGUMENT

Briefly stated, the Government's position is:

1. This court lacks jurisdiction to consider an appeal from the decision under Section 207(b) of the RRRA. Congress specifically and expressly limited appeals from decisions under Section 207(b) to the Special Court, and rejected jurisdiction in the courts of appeals to consider appeals from orders under Section 207(b).

2. Despite Pennsylvania's failure to argue vigorously the jurisdictional contentions to the Special Court, and its request that the Special Court not consider these contentions, the Special Court's decision on these points binds the Commonwealth here, on principles of judicial finality. The Special Court had jurisdiction, indeed a duty, to determine its own and the reorganization court's jurisdiction in reviewing the reorganization court's decisions.

3. The 120-day decision is not appealable. This does not mean that determinations made by the reorganization court in its 120-day decision are not reviewable, but only that review of these determinations must await the final 180-day determination under Section 207(b) as to the ultimate course of the reorganization.

4. A case or controversy was presented in the litigation under Section 207(b) not only because of the bankruptcy reorganization setting in which the decision was to be made, but also because of the basic adversary posture of the parties with respect to the ultimate course of the Lehigh & Hudson River reorganization, the determination of which is the purpose of the Section 207(b) litigation.

5. Section 207(b) does not require the court to make non-judicial decisions at the 120-day stage. The court's decision unless reversed on appeal is final and not subject to modification by coordinate branches of the Government. Furthermore, courts customarily make findings like those required at the 120-day stage by Section 207(b).

6. The Commonwealth of Pennsylvania lacks standing to attack the reorganization court's 180-day order that the Lehigh & Hudson River not reorganize subject to the RRRA. That is precisely the result which Pennsylvania sought. Indeed, if Pennsylvania's jurisdictional contentions were correct, no order under Section 207(b) would be permissible, and, by the terms of Section 207(b), reorganization would proceed pursuant to the RRRA—the result which Pennsylvania seeks to avoid. In any event, the 180-day decision has now been reversed, and these appeals are moot.

ARGUMENT

I. THE COURT OF APPEALS LACKS JURISDICTION IN THIS CASE.

This court, like all inferior federal courts, is a court of limited jurisdiction.

"The United States courts of appeals possess only such jurisdiction as is conferred upon them by statute." 9 Moore's Federal Practice, 110.01, p. 47.

The power of Congress to limit this court's jurisdiction derives from Article III, section 1 of the Constitution, which authorizes Congress to ordain and establish inferior federal courts.

"The congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good." Lockerty v. Phillips, 319 U.S. 182, 187 (1943) quoting Cory v. Curtis, 3 How. 236, 245.

Moreover, when Congress specifically designates an inferior court to conduct judicial review, that forum is exclusive, even without the use of the word "exclusive". Whitney Bank v. New Orleans Bank, 379 U.S. 411, 422 (1965); Lockerty v. Phillips, *supra*; Getty Oil Co. v. Ruckelshaus, 467 F.2d 349 (3rd Cir. 1972), *cert. den.*, 409 U.S. 1125 (1973); Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973); UMC Industries v. Seaborg, 439 F.2d 953 (9th Cir. 1971). For example, in Municipal Intervenors Group v. Federal Power Commission, 473 F.2d 84 (D.C. Cir. 1972), the Court of Appeals for the District of Columbia Circuit dismissed an appeal from an FPC order. The order arose in the general framework of a proceeding under the Natural Gas Act, 15 U.S.C. 717c(e), concerning the lawfulness of proposed rate increases of natural gas companies. However, after the proceeding

was pending, the President implemented a wage-price control program under the Economic Stabilization Act of 1970, 12 U.S.C. 1904. The challenged FPC order authorized an interim rate increase, and found, pursuant to Price Commission regulations, that the increase was consistent with the economic stabilization program. Opponents of the rate increase appealed to the D.C. Circuit, as authorized by 15 U.S.C. 717r(b). This provision provided that any

"party to a proceeding under [the Natural Gas Act] aggrieved by an order issued by the Commission in such proceeding"

may have judicial review of the order in the Court of Appeals for the District of Columbia Circuit by filing a petition of review in that court. The Court of Appeals dismissed the petition for review for lack of jurisdiction. The court held that judicial review of the contested orders

"is governed, not by the provisions for judicial review of orders under the Natural Gas Act, but by provisions for judicial review of orders under the Economic Stabilization Act. §211(a) of the Economic Stabilization Act, as amended in 1971, specifically gives the District Courts of the United States 'exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder * * *.'

"This court, like the other United States courts of appeals, has been given no jurisdiction to decide or entertain review of such controversies. Appellate review authority is concentrated exclusively in a special court, the Temporary Emergency Court of Appeals, established as a national court of appeals in order to prevent the possibility of conflicting rulings by intermediate United States appellate courts, and danger to the anti-inflation program." 473 F.2d 88-89.

The court noted that the FPC's action—of making a determination of consistency with the Economic Stabilization Act of 1970—"must

necessarily reflect an authority granted by at least the general framework of the Natural Gas Act * * *." 473 F.2d at 90. But the fact that the FPC had acted within the general framework of the Natural Gas Act and indeed had entered its order in a proceeding which predated the President's executive order imposing price controls did not "undercut the central reality of this case"

"that a claim that the FPC has erred in its determination that a rate increase is consistent with the Economic Stabilization Act, is a claim arising under that Act, and that Congress has made clear an intent for a special and limited judicial review of any such claim of illegality of agency action." 473 F.2d at 90.

Thus, the threshold question to be resolved here is the question of this court's jurisdiction. A determination that Congress conferred no jurisdiction on this court to review the §207(b) decisions of the district court ends the present case in dismissal at this point. The court should not advance further, without jurisdiction, to declare constitutional law or to legislate jurisdiction for itself under the guise of Section 24 of the Bankruptcy Act. More precisely, if this court lacks jurisdiction here, it should refuse to decide:

- (a) whether the 120-day decisions are appealable;
- (b) whether the §207(b) decisions violate Article III of the Constitution.

In enacting §207(b) Congress expressly limited review of reorganization court orders under that section to the Special Court, and expressly rejected appellate review by the courts of appeals. The express words of the statute limit review of the §207(b) orders to the Special Court:

"An appeal from an order made under this section may be made only to the special court."

A review of the legislative history shows that Congress considered and rejected giving the courts of appeals jurisdiction over appeals from §207(b) orders. The House version of §207(b), then numbered §301 of H.R. 9142, provided as follows, in material part:

"The finding of each district court under the first sentence of this section, or the presumption created under the third sentence of this section, as the case may be, shall be subject to appeal as in the case of an order granting or denying a preliminary injunction pursuant to rule 52 of the Federal Rules of Civil Procedure and section 1292 of title 28 of the United States Code and any such appeal proceedings shall be concluded on an expedited basis."

Appeals under 28 U.S.C. 1292 are of course to the courts of appeals. See H. Rep. 93-620, 93rd Cong., 1st Sess., November 3, 1973, pp. 4, 46-47.

As reported from the Senate Commerce Committee, §207(b) had been changed and now provided, in material part:

"An appeal from an order made under this section may be made only to the special court." See S. Rep. 93-601, 93rd Cong., 1st Sess., December 6, 1973, pp. 28, 70-71.

In this respect §207(b), as it emerged from conference and was enacted, followed the Senate version. See S. Rep. 93-664, 93rd Cong., 1st Sess., December 26, 1973, pp. 16-17, 49-52 ("the conference substitute is the same as the Senate amendment * * *").

The rationale for designating the Special Court as exclusive reviewing court under §207(b) is evident. Congress recognized that it was dealing with reorganization proceedings in more than one

circuit, and was concerned about the possibility of inconsistent appellate decisions arising from appeals of the reorganization court's §207(b) orders. By substituting the Special Court for the various courts of appeals, the danger of inconsistent appellate rulings disappeared. This reasoning was summarized by Senator Javits during the floor debate:

"On the legal side, I might say to the Senator from Indiana, that the concept of a special court has been very creative. Our experience in the environmental field indicated what a mess can be made of the best laid plans by diversity of legal proceedings all over the Nation, with different theories cancelling each other out very often, and not resolvable until you get to the Supreme Court, and sometimes not even then. Here, by exercising the authority we first exercised in the Judiciary Act of 1789, we have provided for consolidating these proceedings and appointing a special court for the purpose. I think it is very, very gifted position for which the committee is entitled to great credit." Statement of Senator Javits, Dec. 21, 1973, Cong. Rec. - Daily Version, p. S.23780.

It thus appears that Congress did not intend for this court to have any jurisdiction to review the §207(b) decisions of the district court, and this appeal should be dismissed.^{6/}

^{6/} The arguments of the New Haven Trustee's brief (at 19)—pp. 17-33 of which were incorporated by reference in one of Pennsylvania's Third Circuit briefs, which in turn Pennsylvania incorporates by reference here—that §207(b) should be construed so as to avoid issues under Article III, Section 2 of the Constitution would apply only if Congress had not made its intention clear. United States v. Thirty-seven Photographs, 402 U.S. 363, 369 (1971). Here only one construction of §207(b) is fairly possible—that the Special Court has exclusive jurisdiction, and that this court has no jurisdiction, to review district court decisions under §207(b).

II. PENNSYLVANIA IS BOUND BY THE SPECIAL COURT'S
DECISION ON THE CONSTITUTIONAL JURISDICTIONAL
ISSUES.

In the consolidated appeals before the Special Court from the various reorganization court decisions under Section 207(b), Pennsylvania and the Trustee of the New Haven railroad raised the jurisdictional issues presented here. But while the New Haven Trustee briefed and argued these issues to the Special Court, Pennsylvania by contrast attempted to reserve those issues for the present appeal and its pending appeals in the Third Circuit.^{7/} Pennsylvania expresses surprise that, notwithstanding its attempted reservation, the Special Court nevertheless decided the jurisdictional issues not only in the Penn Central case but also in the L&HR and other cases consolidated with Penn Central. Pennsylvania contends that the Special Court improperly reached for and decided the jurisdictional issues, at least in the Lehigh & Hudson River case, and, therefore, that Pennsylvania is not bound here by the Special Court's determination. We disagree.

The jurisdictional issues which Pennsylvania attempted to reserve for later decision here involve potential conflicts between Section 207(b) and Article III of the Constitution: Is a "case or controversy" within the federal judicial power presented by Section 207(b) proceedings or are those proceedings essentially legislative in nature, calling for the rendering of an advisory opinion? These issues are not capable of being reserved or waived; they affect

^{7/} In re Penn Central Transportation Co., Nos. 74-1589, 1687;
In re Central Railroad Co. of New Jersey, Nos. 74-1558, 1686;
In re Reading Co., Nos. 74-1556, 1689; In re Lehigh Valley Railroad Co., Nos. 74-1556, 1688. Pennsylvania incorporates its briefs in these appeals by reference herein.

not only the reorganization court's jurisdiction under §207(b), but also the jurisdiction of the Special Court, itself an Article III court. Even had Pennsylvania not raised these issues in the Special Court, the Special Court would have been required to consider and decide them. Article III jurisdiction is not capable of being conferred by action or inaction of the parties, but must be considered and decided by the court before it proceeds to act in a matter before it. Regional Rail Reorganization Act Cases, 43 U.S.L.W. 4031, 4042 (Dec. 16, 1974); Sosna v. Iowa, 43 U.S.L.W. 4125, 4127-28 (Jan. 14, 1975), citing Richardson v. Ramirez, 418 U.S. 24 (1974); Chapman v. Meier, 43 U.S.L.W. 4199, 4203 (Jan. 27, 1975); Dunn v. Blumstein, 405 U.S. 330, 333, n.2, (1972); Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971). Thus, the Special Court properly considered and decided the Article III issues.

Once having raised (although not pressed) the jurisdictional issues in the Special Court and the Special Court having determined these issues, Pennsylvania may not relitigate them here. As Professor Moore states:

"Where the issue of jurisdiction is raised and is determined in favor of jurisdiction and the case then proceeds to a judgment on the merits, on well-settled principles the judgment is not later open to collateral attack on the jurisdictional issue, whether or not the determination thereon was erroneous." 1B Moore's Fed. Prac. ¶ 0.405[5], p. 658.

See also Williams v. State of North Carolina, 325 U.S. 226, 230 (1945); Jackson v. Irving Trust Co., 311 U.S. 494, 499-500 (1941); American Surety Co. v. Baldwin, 287 U.S. 156, 166 (1932). Evers v. Watson, 156 U.S. 527 (1895); McCormick v. Sullivant, 10 Wheat. 192, 23 U.S. 85 (1825); Allegheny Corp. v. Kirby, 340 F.2d 311, 312, n. 1 (2d Cir. 1965)(en banc), cert. dismissed as improvidently granted, 384 U.S. 28 (1966).

III. THE 120-DAY DECISION UNDER §207(b)
IS NOT APPEALABLE.

The Special Court under the Regional Rail Reorganization Act has held that the 120-day decisions under §207(b) are non-appealable. In re Penn Central Transportation Co., 382 F. Supp. 453 (Sp. Ct. 1974). Pennsylvania was an appellant in the latter proceedings before the Special Court. The United States was an appellee. We submit that, for reasons of judicial economy and finality, Pennsylvania should be bound by the decision of the Special Court, and is not entitled to another opportunity to relitigate this issue in this case.

Generally, the principles of res judicata apply to questions of jurisdiction. American Surety Co. v. Baldwin, supra. More specifically, Professor Moore states that a judgment dismissing for lack of jurisdiction

"is conclusive as to the matters adjudged; * * * and the parties are precluded from relitigating the very matter of jurisdiction, venue, or other such matter, which was adjudged in the prior action." 1B Moore's Federal Practice, ¶10.405[5], p. 660, and cases cited therein.

Here, the Special Court dismissed the appeals of the New Haven Trustee and Commonwealth of Pennsylvania for lack of jurisdiction, in that the 120-day decisions were not intended by Congress to be appealable. This determination should bind Pennsylvania.

For reasons of comity alone, this court should defer to the jurisdiction and determination of the Special Court. Having explicit statutory jurisdiction, and having exercised it, the Special Court is entitled to this court's deference. See New Haven Inclusion Cases, 399 U.S. 392, 419-430 (1970).

IV. THE LITIGATION UNDER SECTION 207(b) PRESENTS
A CASE OR CONTROVERSY.

Pennsylvania contends that the reorganization court lacked jurisdiction to make the 120-day decisions required by Section 207(b) because no "case or controversy" in the constitutional sense arises under Section 207(b). Thus, it argues, Section 207(b) requires the reorganization court to render an advisory opinion. We wholeheartedly disagree. In re Penn Central Transportation Co., supra, 384 F. Supp. at 915.

The Supreme Court has attempted to define "case or controversy" in a number of cases. The results have been characterized as "classic if cryptic". Wright, Federal Courts, 2d Ed., §12, p. 34. In Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 239 (1937), Chief Justice Hughes said:

"A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

Later, Chief Justice Warren in Flast v. Cohen, 392 U.S. 83, 94-95 (1968) said that the terms "case" and "controversy":

"have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government. Embodied in the words 'cases' and 'controversies' are two complementary by somewhat different limitations. In part those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those

words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case and controversy doctrine."

In a recent attempt to define "case or controversy", the Supreme Court in Goosby v. Osser, 409 U.S. 512, 516-517 (1973) indicated that a controversy must touch the legal relations of parties having adverse interests, that issues must be "presented in the context of a live grievance", and that the court must be "called upon to adjudge the legal rights of litigants in actual controversies." See also DeFunis v. Odegaard, 416 U.S. 312 (1974); Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974); Steffel v. Thompson, 415 U.S. 452 (1974); Gilligan v. Morgan, 413 U.S. 1 (1973); Roe v. Wade, 410 U.S. 113, 128 (1973); Laird v. Tatum, 408 U.S. 1 (1972); Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971); Golden v. Zwickler, 394 U.S. 103 (1969); Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237 (1952); Coffman v. Breeze Corp., 323 U.S. 316 (1945); Maryland Casualty Co. v. Pacific Co., 312 U.S. 270 (1941); Nashville, Chattanooga & St. Louis Railway Co. v. Wallace, 288 U.S. 243 (1933); Fidelity National Bank v. Swope, 274 U.S. 123 (1927). See also Sosna v. Iowa, 43 U.S. L.W. 4125, 4127-4129 (Jan. 14, 1975)(class actions).

Applying the general criteria defined by the Supreme Court to the §207(b) proceeding, arising in the context of a Section 77 proceeding, it is apparent that a "case or controversy" in the constitutional sense does in fact exist here.

At the outset, it is important to recognize that, despite the fact that §207(b) requires decisions at 60-day intervals, §207(b)

establishes a single procedure by which it can be determined whether or not a debtor railroad, in Section 77 reorganization, will be reorganized under the new Act. This ultimate question is presented in an adversary context. As Judge Friendly remarked in Penn Central, "To say there was a live controversy [citing cases] in each of these [Section 207(b)] cases would be something of an understatement." 384 F. Supp. at 914. The question touches the legal relations of parties having adverse legal interests, e.g. Pennsylvania and some creditors, who seek L&HR's reorganization outside RRRA, vis-a-vis the United States and others who contend that the L&HR is subject to reorganization under the RRRA. The controversy is definite, concrete, and immediate: The reorganization court must decide the question within 180 days of the enactment of the RRRA. The question admits of "specific relief through a decree of a conclusive character": Under §207(b) the reorganization court must order that the L&HR be reorganized on an income basis, or be reorganized under the RRRA or that the reorganization proceeding be dismissed. This relief is not subject to review by the executive or legislative departments of government. See Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103, 113-14 (1948). Finally, as discussed below, a decision as to the ultimate course of the reorganization of the debtor railroad is one "historically viewed as capable of resolution through the judicial process," Flast v. Cohen, supra, at 95. See, e.g., In re New York, New Haven & Hartford R.R. Co., 289 F. Supp. 451 (D. Conn. 1968).

Pennsylvania, adopting arguments presented in the Penn Central case by the New Haven Trustee, contends that the §207(b) proceeding is not a case or controversy because it is not presented to the

court by means of traditional pleadings and procedure. Thus, it argues, it is impossible to learn from the record who is the plaintiff and who are the defendants. The specific answer to this contention was given by Judge Friendly in Penn Central, 384 F. Supp. at 913-914. More generally, see the statement of Mr. Justice Stone in Nashville, Chattanooga & St. Louis Railway Co. v. Wallace, supra, 288 U.S. at 264, in which the court ruled that state declaratory judgment proceedings presented a "case or controversy" within Article III of the Constitution:

"But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystalize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts."

See also Aetna Life Insurance Co. v. Haworth, supra, at p. 244:

"It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."

Moreover, in Wright v. Vinton Branch Bank, 300 U.S. 440 (1936), the Supreme Court upheld a provision in the amended Frazier-Lemke Act authorizing the bankruptcy court to declare provisions of the Act no longer applicable in its locality upon a finding that the emergency giving rise to the Act no longer existed there. Nothing in the Act provided for a petition or the trappings of commonplace litigation. Nevertheless, the court ruled that the authority so granted "does not exceed limits of authority familiarly exercised by courts." 300 U.S. at 463, n. 7.

Arising as it does in the context of an ongoing Section 77 proceeding, the §207(b) proceeding need not have been raised by specific pleadings filed by any party. Interested and adverse parties are already before the court in the Section 77 proceeding.^{8/} Rather than look merely to the bare words of the statute, or to the form in which the §207(b) question is presented, the court should consider "the nature of the controversy, the relation and interests of the parties, and the relief sought" Aetna Life Insurance Co. v. Haworth, supra, 300 U.S. at 241. Upon such analysis, the §207(b) proceeding clearly presents a constitutional "case or controversy".

V. THE SECTION 207(b) "120-DAY" DETERMINATIONS ARE JUDICIAL IN NATURE.

Pennsylvania, incorporating one of its Third Circuit briefs, argues the Section 207(b) requires the reorganization court to make non-judicial "legislative" or public interest findings.^{9/} We

^{8/} We agree with Judge Friendly, 384 F. Supp. at 914, that the general framework of the Section 77 proceeding in which the §207(b) litigation takes place provides the "case or controversy" when considered together with the clash of adverse party interests involved in the particular §207(b) litigation. In Burco, Inc. v. Whitworth, 81 F.2d 721 (4th Cir.), cert. den. 297 U.S. 724 (1936), a Section 77B reorganization was held to be the case or controversy sufficient to give the court jurisdiction to respond to a request of the trustees for instructions as to whether they should comply with the Public Utility Holding Company Act of 1935. In responding, the court upheld its jurisdiction to rule on the constitutionality of that Act, even in the absence of the Government as a formal party (the Government was an amicus curiae).

^{9/} These determinations are:

"* * * whether the railroad is reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act."

contend, and the Special Court has decided, that the Section 207 public interest findings are judicial in character. See In re Penn Central Transportation Co., supra, 384 F. Supp. at 914-915. They arise as part of an actual "case or controversy" involving the clash of real, not contrived, adverse interests. cf. Muskrat v. United States, 219 U.S. 346 (1911); Moore v. Charlotte-Mecklenburg Board of Education, supra. The court's determination is final, not subject to review by the executive or legislative departments. cf. Hayburn's Case, 2 Dall. 409 (1792); United States v. Ferreira, 13 How. 40 (1851); Gordon v. United States, 117 U.S. 697 (1864); Postum Cereal Co. v. California Fig Nut Co., 272 U.S. 693 (1927); Ex Parte Bakelite Corp., 279 U.S. 438 (1929); Williams v. United States, 289 U.S. 554 (1933); Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103, 113-14 (1948); McGrath v. Kristensen, 340 U.S. 162, 167 (1950). The 120-day determinations are not akin to the legislative rate-making function held impermissible for an Article III court in Keller v. Potomac Electric Power Co., 261 U.S. 428 (1923). Quite the contrary, both 120-day determinations have ample judicial precedent.

Prior to the enactment of Section 77 of the Bankruptcy Act, the reorganization of railroads was solely the function of the court using the equity receivership proceeding. See, e.g., Northern Pacific R.R. Co. v. Boyd, 228 U.S. 482. Even after the enactment of Section 77, the court retained some control over the ultimate course of the reorganization. Under Section 77(g) the court, on its own motion, after considering the ICC's recommendation could dismiss the reorganization proceeding if it found undue delay in a reasonably expeditious reorganization of the debtor.

Under Section 77, the courts continued to make important strategic decisions relating to the ultimate course of the reorganization. Thus, Judge Anderson decided that the New Haven railroad should seek reorganization by inclusion in the Penn Central merger and decided that the inclusion of the New Haven in the merged Penn Central must be accomplished by January 1, 1969, in order to avoid a cessation of New Haven's operations and a dismissal of the reorganization. See In re New York, New Haven & Hartford R.R. Co., 289 F. Supp. 451 (D. Conn. 1968). More recently, in the so-called Columbus Options Appeal decision, In re Penn Central Transportation Co., 494 F.2d 270 (3rd Cir. 1974), cert. den., ___ U.S. ___ (October 15, 1974), the court emphasized the necessity under certain circumstances for the court to make a determination of a high degree of likelihood of reorganization within a reasonable time.

Under Section 77 of the Bankruptcy Act, the court must make a number of determinations of the public interest. For example, under Section 77(c)(6) upon the rejection of a lease of a line of railroad, the lessor has the duty to begin operating such line, unless the judge decrees after a hearing "that it would be impracticable and contrary to the public interest for the lessor to operate" the rail line. Under Section 77(o) the court must consider the effect on the "public interest" of any sale of the debtor's rail lines. In re Boston & Maine Corp., 455 F.2d 1205 (1st Cir. 1972), reversing the district court's Section 77(o) order allowing the B&M Trustees to abandon a rail line because of the "district court's refusal to receive evidence regarding

the effect of the proposed abandonment upon the public interest."
455 F.2d at 1207.

Public interest findings are required of the court under Section 208 of the Labor Management Relations Act, 29 U.S.C. 178. Under that Act, the district court may enjoin an industry-wide strike or lockout, if it finds that such strike or lockout, "if permitted to occur or to continue, will imperil the national health or safety." This provision was challenged as imposing a nonjudicial determination upon an Article III court in United States v. United Steelworkers of America, 202 F.2d 132 (2d Cir. 1953), cert. den., 344 U.S. 915 (1953). The court rejected the challenge:

"The prohibition of strikes or lockouts under given circumstances implies that they are, under such circumstances, an invasion of the rights of the public. Whether it is the duty of the court to grant an injunction depends upon the findings of fact to be made by the court as the statute requires. The statute creates the right on the part of the public to be protected from the danger of such a strike or lockout. Whether there is an existing or threatened strike or lockout which, under the statute, is an invasion of the rights of the public presents the usual kind of case or controversy which is justiciable by a court. Indeed, it falls neatly within the definition found in Muskrat v. United States, 219 U.S. 346, 357 * * *." p. 139.

Section 208 of the Labor Management Relations Act was again challenged on Article III grounds in United Steelworkers of America v. United States, 361 U.S. 39 (1959). Again the challenge was rejected:

"We are of opinion that the provision in question as applied here is not violative of the constitutional limitation prohibiting courts from exercising powers of a legislative or executive nature, powers not capable of being conferred upon a court exercising solely 'the judicial power of the United

States'. Keller v. Potomac Elec. Power Co., 261 U.S. 428; Federal Radio Comm'n. v. General Elec. Co., 281 U.S. 464. * * * [T]he statute does recognize certain rights in the public to have unimpeded for a time production in industries vital to the national health or safety. It makes the United States the guardian of these rights in litigation. cf. Gordon v. United States, 2 Wall. 561, 117 U.S. 697. We conclude that the statute entrusts the courts only with the determination of a 'case or controversy', on which the judicial power can operate, not containing any element capable of only legislative or executive determination." pp. 43-44.

See also the separate concurring opinion of Mr. Justice Frankfurter and Mr. Justice Harlan, 361 U.S. at 44, 60-62, reviewing the long history of judicial power to protect the public interest from nuisance. This equitable power to protect the public interest, even in the absence of an enabling statute, has been impressively utilized to prevent railroad industry problems from adversely affecting the public interest. See In re Debs, 158 U.S. 564.

Nor is the term "public interest" in §207(b) vague and undefined. In §101(a)(3) of the Act, Congress gave a clear indication of what it believed to be the public interest involved:

"The public convenience and necessity require adequate and efficient rail service in this region and throughout the Nation to meet the needs of commerce, the national defense, the environment and the service requirements of passengers, United States mail, shippers, States and their political subdivisions, and consumers."

Indeed, as applied to railroads, the term "public interest" appears to be a term of art. The Supreme Court construed the term "public interest" as used in §5 of the Interstate Commerce Act as amended by the Emergency Railroad Transportation Act of 1933:

"And that term as used in the statute is not a mere general reference to the public welfare, but, as shown by the context and purpose of the Act 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to

27

appropriate provision and best use of transportation facilities.' New York Central Security Corp. v. United States, [287 U.S. 12], supra." Texas v. United States, 292 U.S. 522, 531 (1934).

See also Chicago & Southern Airlines v. Waterman Corp., 333 U.S. 103, 108 (1948). Thus, the term "public interest" has ascertainable meaning.

VI. PENNSYLVANIA LACKS STANDING TO CHALLENGE
THE DISTRICT COURT'S DECISION, WHICH IN
ANY EVENT IS NOW MOOT.

Pennsylvania's only valid interest in this controversy lies in its opposition to the reorganization of the Lehigh & Hudson River Railway Company under the RRRA. Avoiding such a reorganization has been Pennsylvania's aim in the court below, in the Special Court, and in this court. For this reason, it attacks the jurisdiction of the reorganization court to make the findings required by Section 207(b) of the RRRA. But Pennsylvania ignores the fact that, under Section 207(b), the only way to avoid reorganization of L&HR under the RRRA is for the reorganization court to make the 120-day and 180-day findings. Failure of the reorganization court to make these findings automatically triggers reorganization under the RRRA, because Section 207(b) also provides:

"If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act."

It is this provision of Section 207(b) which really affects Pennsylvania's interest. Yet Pennsylvania does not attack it. Nor does Pennsylvania attack the merits of Judge Ward's 120-day decision—that L&HR was not reorganizable on an income basis within a reasonable time under Section 77. The Commonwealth challenged the merits of this finding in the district court and

on appeal to the Special Court (which rejected the challenge), but does not raise the point on this appeal.

In any event, Judge Ward in his 180-day decision ordered that L&HR not reorganize subject to the RRRRA. Moreover, he refused to dismiss the reorganization proceedings. This decision hardly threatens any real and immediate injury to Pennsylvania's interests so as to give Pennsylvania standing on appeal to attack it. See O'Shea v. Littleton, 414 U.S. 488, 493, 499 (1974); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973); Golden v. Zwickler, 394 U.S. 103, 108-109 (1969); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270-273 (1941); Sosna v. Iowa, 43 U.S.L.W. 4125, 4131 (Jan. 14, 1975) (dissenting opinion of Mr. Justice White). On the contrary, the 180-day decision reached the desired result from Pennsylvania's point of view. Thus, the Commonwealth lacks standing to attack it on appeal.

It is well-settled that a live controversy must exist, not only at the time of the district court's decision, but also at the time of appellate or certiorari review. Sosna v. Iowa, supra; Roe v. Wade, 410 U.S. 113, 125 (1973); SEC v. Medical Committee, 404 U.S. 403 (1972). Intervening changes in circumstances, e.g. in the status of the parties or in applicable law, may cause an appellate court to remand a case for reconsideration in light of changed circumstances, or, as here, may moot a case altogether. See Fusari v. Steinberg, 43 U.S.L.W. 4121, 4124 (Jan. 14, 1975); DeFunis v. Odegaard, supra; Diffenderfer v. Central Baptist Church, 404 U.S. 412 (1972).

19

Here, a case or controversy in the constitutional sense no longer exists. Intervening events, particularly the Special Court's decision in the L&HR case, have now mooted this appeal, by accomplishing precisely the result which Pennsylvania seeks here (brief at 3)—reversal of the L&HR 180-day decision. This case no longer admits "of specific relief through a decree of a conclusive character * * *." Aetna Life Insurance Co. v. Haworth, supra, 300 U.S. at 239. A decision by this court in these appeals would not now affect the district court's decisions or the legal rights of any party. It would be a classic advisory opinion. For these reasons, the present appeals should be dismissed as moot.

CONCLUSION

For all the reasons stated above, the United States of America respectfully urges this court to dismiss the present appeals or, in the alternative, to affirm the orders of the district court.

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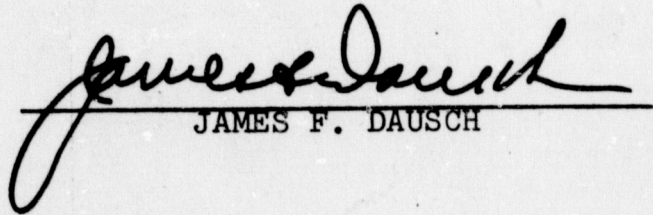
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of March, 1975, I caused copies of the foregoing Brief to be mailed to counsel for all parties to this proceeding.


JAMES F. DAUSCH

A D D E N D A

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

In the Matter of:

THE LEHIGH AND HUDSON RIVER
RAILWAY COMPANY, (SDNY)

:
: Docket No. 74-1

In the Matter of:

THE CENTRAL RAILROAD COMPANY
OF NEW JERSEY (DNJ)

:
: Docket No. 74-2

In the Matter of

LEHIGH VALLEY RAILROAD COMPANY
(ED of PA)

:
: Docket No. 74-4

In the Matter of

READING COMPANY (ED of PA)

:
: Docket No. 74-5

RESPONSE TO NOTICE TO SHOW CAUSE

Preliminary Statement

Respondent, Commonwealth of Pennsylvania, has taken four appeals from four orders, entered under the first sentence of section 207(b) of the Act, on or about May 2, 1974, by four railroad reorganization courts.

Prior thereto, this court on April 26 issued Rules, wherein it is stated (Rule 13):

"The judges of the Special Court being doubtful whether decisions of the district courts under the first sentence of section 207(b) are appealable, the Clerk is directed, in the event of the filing of an appeal from any such decision, immediately to send to counsel for the appellant, with a copy to counsel for each other party, a notice to show cause substantially in the form attached as Form 1. It is contemplated that the date to be specified in such notice will be during the week of May 20, 1974."

Decisions of May 2, 1974

The Judicial Panel on Multidistrict Litigation consolidated some 9 proceedings^{1/} with respect to the final system plan in this court. However, at least two section 77 proceedings in the Region were not so consolidated.^{2/}

The reorganization courts for Erie Lackawanna Railway Company^{3/} and Boston & Maine Corporation^{4/} found that their railroads are reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act, and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. Pennsylvania participated in both section 207(b) cases in support of the ultimate findings. We understand that no appeals have been taken, and that no further proceedings under section 207(b) are contemplated. These two carriers have strong traffic affiliations with the Norfolk & Western System. See: Penn-Central Merger Cases, 389 U.S. 486.

The reorganization courts for the Reading Company (RDG)¹ and Central Railroad Company of New Jersey (CNJ) each found that their railroads are not reorganizable on an income basis within a reasonable time; however, each court declined to make a "public interest" finding as required by the second portion of the first sentence of section 207(b). Both decisions are adverse to our

^{1/} We have considered the 15 Penn Central Secondary Debtors as one.

^{2/} New Hope & Ivyland Railroad; Cadillac & Lake City Railroad.

^{3/} No. B72-2838 (USDC-ND Ohio-E.D.). Order No. 234

^{4/} No. 70-250-M (USDC-D.Mass.). Memorandum Opinion.

position, and we have lodged appeals to the U.S. Court of Appeals for the Third Circuit as well as to the Special Court. Both of these carriers have strong traffic affiliations with the Chessie System. Penn-Central Merger Cases, supra.

The Lehigh & Hudson River Railway Company (L&HR) court entered negative findings as to both portions of the first sentence of section 207(b). We have appealed to the U.S. Court of Appeals for the Second Circuit and to the Special Court.

The Lehigh Valley (LV) and Penn Central (PC) reorganization courts both found that these railroads^{5/} are not reorganizable within a reasonable time under section 77; however, the courts declined to make "public interest" findings. We have appealed the LV determination to the U.S. Court of Appeals for the Third Circuit and to the Special Court.

The Penn Central (Secondary Debtor) decision found 12 of the "railroads" to be reorganizable on an income basis within a reasonable time, but that the evidence does not "preponderate" in favor of a finding that the public interest would be better served by continuing the present reorganization proceedings; as to the remaining three railroads, the court found that the record does not permit a decision at this time as to whether the railroad is reorganizable on an income basis within a reasonable time under section 77, and no "public interest" finding was made.

The reorganization court for the Ann Arbor Railroad^{6/} determined the railroad is not reorganizable within a reasonable time under section 77; no "public interest" finding was made.

^{5/} LV petitioned for reorganization in 1970 as part of PC's plan of reorganization.

^{6/} No. 74-90833 (USDC-ED Mich.-S.D.). Memorandum Opinion.

The reorganization court for the New Hope & Ivyland Railroad Company^{7/} concluded that the railroad can be reorganized on an income basis within a reasonable period of time under section 77 and that the public interest would be better served by continuing the present reorganization proceedings rather than by a reorganization under the Regional Rail Reorganization Act of 1973.

Jurisdiction of Reorganization Court

A reading of the opinions of the various reorganization courts indicates confusion and serious questions as to whether the various courts have jurisdiction to make the determinations set forth in the first sentence of section 207(b). We believe the reorganization courts for the L&HR, CNJ, RDG and LV are without jurisdiction to make the findings in section 207(b).

THE ORDERS OF MAY 2, 1974 ARE APPEALABLE

The orders of the various reorganization courts which entered findings under the first sentence of section 207(b), on or about May 2, 1974, are appealable. We have read the response submitted by the New Haven Trustee in No. 74-3, and note his view that the decision with respect to Penn Central is appealable.

We are not privy to the basis for the Special Court's determination, prior to decisions of the reorganization courts, that it is doubtful that decisions under the first sentence of section 207(b) are appealable. It is difficult, therefore, to "Respond" to the Notice issued pursuant to Rule 13.

We have lodged appeals to the appropriate U.S. Court of Appeals as well as to the special court.

^{7/} USDC-EDPa. (Bank. No. 70-324). Order. Of course, any appeal must be to the U.S. Court of Appeals, as the proceeding was not consolidated in the Special Court.

We would have no objection to proceeding with our appeals in the Courts of Appeals; indeed, it would seem preferable that the question of the reorganization court's jurisdiction to enter any findings under the first sentence of section 207(b) be passed upon by the Courts of Appeals. The question is of Constitutional dimension. It is noted that section 207(b) restricts any review of the Special Court's decisions under that section.

The decisions of the reorganization courts for L&HR, CNJ, LV and RDG, under the first sentence of section 207(b), are final in a very real sense. These courts have concluded that subsequent proceedings are not to be governed by section 77 of the Bankruptcy Act. Apart from the arguments of the New Haven Trustee concerning section 24 of the Bankruptcy Act -- in which we concur -- the legislative history of section 207 strongly suggests that Congress intended interlocutory appeals under the first sentence. The House bill as reported specifically provided that appeals could be taken at each stage (at both the first and third sentences of section 207(b)). H. Rept. No. 93-620, at pp. 4, 32, 46-47. The Senate bill as reported spoke merely of "appeal", and the report made no explanation thereof. S. Rept. No. 93-601, at pp. 28, 70-71. The Conference blended together the House & Senate versions and provided for two stages of findings by the various reorganization courts under section 207(b), and provided for appeal to the Special Court. The failure to carry forward the specific language of the House bill does not lead to any inference that Congress intended to bar appellate review of decisions rendered under the first sentence of section 207(b) prior to decisions entered under the second sentence.

CONCLUSION

The decisions of the reorganization courts for L&HR, CNJ, RDG and LV under the first sentence of section 207(b) are appealable.

Respectfully submitted,

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May 21, 1974

Attorneys for Commonwealth of Pennsylvania

Certificate of Service

I hereby certify that I have this 21st day of May, 1974, served a copy of the foregoing upon all counsel by first class mail postage prepaid.

Washington, D.C.

Gordon P. MacDougall

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973

In the Matter of PENN CENTRAL TRANSPORTATION COMPANY,	No. 74-8
In the Matter of PENN CENTRAL TRANSPORTATION COMPANY, et al. (Secondary Debtors)	No. 74-12
In the Matter of LEHIGH VALLEY RAILROAD COMPANY	No. 74-11
In the Matter of THE CENTRAL R.R. CO. OF NEW JERSEY	No. 74-6
In the Matter of THE LEHIGH & HUDSON RIVER RY. CO.	No. 74-10

BRIEF FOR APPELLEE

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AUGUST 1974

CONTENTS

	<u>Page</u>
Preliminary Statement.....	1
Position of Pennsylvania.....	3
Constitutional Issues.....	5
ARGUMENT	
I. A REDUCTION IN RAILROAD CAPACITY IS NOT THE SOLUTION.....	6
II. THE RAILROADS ARE REORGANIZABLE ON AN INCOME BASIS WITHIN A REASONABLE TIME UNDER SECTION 77.....	9
Conclusion.....	11

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BRIEF FOR APPELLEE

Preliminary Statement

These are 17 appeals, taken by the United States Railway Association (USRA) and allied interests, from the decisions of four^{1/} railroad reorganization courts. Five decisions are involved.^{2/} In each, the railroad reorganization court decided that the reorganization of the estate shall not be carried out pursuant to

^{1/} These are Penn Central Transportation Company (Bank. No. 70-347, ED Pa.); Lehigh Valley Railroad Company (Bank. No. 70-432, ED Pa.); The Central Railroad Company of New Jersey (Bank. No. 401-67, D.N.J.) and The Lehigh & Hudson River Railway Company (No. 72B419, SDNY).

^{2/} A separate opinion was entered in the Penn Central (Secondary Deb.)

Regional Rail Reorganization Act of 1973,^{3/} on the ground that the Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization.

These decisions are the so-called "180-day" ~~decisions~~ under the act, and were rendered on or about July 1, 1974, which was 60 days after the May 2 report of the Rail Services Planning Office.^{4/} The second, third and fourth sentences of section 207(b) of the Act read:

"Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. If a court does not enter an order or make a finding as required by this subsection, the reorganization shall be proceeded with pursuant to this Act."

USRA and its allied interests have filed a single brief, addressed almost exclusively to the Penn Central decision, with supplemental addendum and supplemental briefs addressed to certain factual matters requested by the court at the pre-hearing

^{3/} 45 U.S.C. 701, et seq.

^{4/} Section 205 of the Act.

conference for the Penn Central and other proceedings.

Position of Pennsylvania

Commonwealth of Pennsylvania takes the position that Regional Rail Reorganization Act should be returned to the Congress, for amendment, to avoid serious injury to the American economy and to the economy of Pennsylvania. The Act has been aptly forecast as "Phase II of Penn Central". See: Hearings on S. 2188, Northeastern & Midwestern Railroad Transportation Crisis, before U.S. Senate Committee on Commerce, Ser. No. 93-8, at p. 832, 841 (Nov. 15, 1973), testimony of Gov. Milton J. Shapp.

Some 514 witnesses testified in March, 1974, at the I.C.C. hearings in Pennsylvania concerning the Secretary of Transportation's report issued under section 204. Virtually all of this testimony was in opposition to the proposals of the Secretary, and in opposition to the reorganization process under the Act.

We agree with the decisions of the various reorganization courts that the reorganization of the estate shall not be carried out pursuant to the Act.^{5/} Thus we are appellees here. Our principal reasons, however, do not depend upon whether the process of the Act is fair and equitable to the estate; rather, we would have hoped that the courts might have alternatively found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act and that the public interest would be better served by such a reorganization than by a reorganization under this Act. Such latter

^{5/} In addition to these four railroads, four other railroads in reorganization have opted out of the Act. These are Erie-Lackawanna, Boston & Maine, New Hope & Ivyland, and Cadillac & Lake City.

finding is similar to the so-called "120-day" decisions entered about May 2, 1974.

Commonwealth of Pennsylvania had appealed the "120-day" decisions of the Reading, Lehigh Valley, CNJ and L&HR courts to the Special Court. The Special Court declined to consolidate the appeals from the "120-day" decisions with the forthcoming "180-day" decisions, and dismissed the "120-day" decisions for lack of jurisdiction. The Special Court apparently assumed that a negative finding on the first sentence of section 207(b) would lead to an order directing reorganization under the Act;^{6/} however, the question of so-called reorganizability is not presented by the ultimate 180-day decisions, because the decisions rest upon an independent basis, i.e., that the process is not fair and equitable, and the statement of issues presented by the appellants do not embrace reorganizability.

We have raised the public interest question in our appeals to the U.S. Court of Appeals for the Third Circuit,^{7/} where we challenge the constitutionality of the Act as applied to these railroads, particularly with regard to the delegation by Congress of the "public interest" function to an Article III court.

^{6/} This court in its May 24, 1974 opinion stated, at pp. 8-9, "If a district judge who has returned a negative answer to one or both of the questions put in the first sentence of section 207(b) should adhere to that position, this will be the predicate for an order directing reorganization under the Act unless the judge finds that the Act does not provide a process fair and equitable to the estate. The determination of non-reorganizability under section 77 or that the public interest would not be better served by proceeding thereunder will thus be reviewable on appeals from the action or inaction by the district courts under the third and fourth sentences of section 207(b)." This court's rules, adopted April 26, 1974, expressed doubt as to appealability; notices must list points to be raised on appeal. Rules 6(B)(4), 13, Form 1. Earlier, on April 3, 1974, Penn Central's trustees announced their view that the Act, as written and interpreted, did not provide a process which would be fair and equitable.

^{7/} Nos. 74-1556/8, 1589, 1686/9.

Constitutional Issues

We do not consider this Special Court an appropriate forum to review issues involving the constitutionality of the Act as applied to these railroads. Our participation in this Special Court is without prejudice to our position that the reorganization courts (and thus this Special Court) lack jurisdiction. Moreover, it seems to us an improper inference that Congress intended to give this court unreviewable power to determine whether Congress intended to confer certain jurisdiction upon the reorganization courts.

It seems clear that the Judicial Panel on Multidistrict Litigation did not intend this Special Court to pass upon constitutional issues, for after extensive argument and briefing, it determined not to transfer the constitutional cases to this Special Court. The Panel's action was taken under section 209(b) as well as under 28 U.S.C. 1407. See: In Re Litigation Under Reg. Rail Reorganization Act of 1973, 373 F. Supp. 1404-5 (1974). We note that the State of New York, in its amicus curiae brief to the Special Court, asks the court to stay and defer final disposition until the Supreme Court acts in the Connecticut General litigation. We go further and suggest the Special Court not consider constitutional questions.

Since the "public interest" findings of section 207(b) are concerned with jurisdiction, we have and will continue to present these matters with our appeals in the U.S. Courts of Appeal.

It is noted that USRA appears to accept the ruling in Connecticut General that the uniformity requirement is violated by mandating a dismissal of the section 77 proceedings in the event

the reorganization courts opt not to have the railroad be reorganized under the Act. (USRA Br., p. 5, fn. 5) We agree. However, the requirement that a court either accept the Act or dismiss the proceeding is an important underpinning of the entire legislation. (See: Amici Curiae Brief of 30 Congressmen, at p. 11)

ARGUMENT

Regional Rail Reorganization Act of 1973 contemplates the creation of Consolidated Rail Corporation as the repository of all the bankrupt lines in the region. It would be a super Penn Central merger, and would far outstrip the Penn-Central merger of 1968, with respect to size, plant and traffic volume. The viability of such a monster has been questioned below by creditor interests.

I. A REDUCTION IN RAILROAD CAPACITY IS NOT THE SOLUTION.

The principal thrust of the USRA brief, in its analysis of the statutory framework, is its notion that the present railroad difficulties stem in large part from excessive capacity (USRA Br., p. 10), and that the elimination of such alleged excess capacity -- particularly track -- is key to railroad reorganization. (USRA Br., pp. 15-20). However, reference is made to only a single Congressional source. (USRA Br., p. 16, fn. 30).

To be sure, viability of USRA may depend upon a dramatic reduction in capacity so as to achieve optimum efficiency for a single company, but it would seem incorrect to view plant reduction as the present problem of individual railroads.

Abandonments are not the answer. The report of the Rail Services Planning Office highlighted the obvious fact, recognized

by the Penn Central trustees themselves (ICC Rep., p. 16):

"The Penn Central Trustees, in support of their previously advanced proposal to reduce their 20,000 mile system to about 15,000 miles, estimated that the 5,000 mile track reduction would result in annual savings of about \$20 million. Considering that Penn Central has consistently reported annual losses in excess of \$100 million, it is clear that the savings of even \$20 million would go only a short way toward solving its long-range financial problems."

The parallel trend of present events with the Penn Central disaster should be noted, for the principal cause for Regional Rail Reorganization Act of 1973 is the disastrous merger of the former Pennsylvania Railroad Company with the former New York Central Railroad Company, which was consummated February 1, 1968.^{8/} The PRR paid dividends in every year up until its merger in 1968. The NYC likewise had an excellent financial history. Neither railroad had ever been in reorganization until, once merged on February 1, 1968, the behemoth went bankrupt two years later in June, 1970.

The rationale underlying the Penn-Central merger was that railroad traffic would dramatically decrease, such that merger would bring railroad plant in line with railroad business. The I.C.C. examiners stated, adopted by the I.C.C. itself in Pennsylvania R. Co.-Merger-New York Central R. Co., 327 I.C.C. 475, 481-82 (1966):

^{8/} See: Testimony of Gov. Milton J. Shapp in Northeastern Railroad Transportation Crisis, Hearings on S. 1031, S. 2188 & H.R. 9142, before U.S. Senate Committee on Commerce, Ser. 93-8, at pp. 162-204 and 832-43. (1973).

"Continuously declining traffic levels over the past years have resulted in a reduction in plant for both applicants. Their application to merge is another step in that direction and which applicants have shown will be fruitful of operating economies in the long run." 327 I.C.C. at 681.

"From a traffic and revenue standpoint, every evidentiary factor indicates a longrun decline broken only by normal cyclical variations and under existing circumstances, no prudent justification exists for expecting a radical recovery from this long-range trend." 327 I.C.C. at 911.

"Rail output will continue to fluctuate around the 600 billion ton-mile mark with approximate upper and lower limits of 650-660 and 550-560.

"Eastern District roads and the PRR-NYC specifically will face a continued decline in output.

"In light of the long-term growth of real output, the increasing transportation demand of the economy will be supplied by modes, public and private, other than rail." 327 I.C.C. at 739.

In actual fact -- as is well known -- Penn Central traffic at the time of entry into reorganization was about 40 percent higher than projected.^{9/} Nevertheless, Penn Central's trustees rejected dissolution of the merger because of "additional^{10/} turmoil":

"On hindsight, the merger of the Pennsylvania and the New York Central may not have been the best alinement of those roads. However, it is now, after great turmoil from labor, shipper, and management viewpoints, serving as an effective trunkline railroad. We see real disadvantage in dismembering the enterprise with all the additional turmoil that such a dismemberment would entail."

^{9/} Revenue ton-miles for Class I railroads was 852 billion in 1973.

^{10/} See: Testimony of Jervis Langdon in Northeast Rail Transportation, Hearings on H.R. 6591, et al., before House Committee on Interstate & Foreign Commerce, Ser. No. 93-30, at pp. 252-52 (1973).

Rather than further consider the break-up of Penn Central into two carriers roughly along the lines of the former-PRR and former-NYC, the trustees of Penn Central suggested a reduction in the 20,000-mile system to a lesser 11,000-mile "core" by way of line abandonments.^{11/}

The recent I.C.C. hearings on the report of the Secretary of Transportation under section 204 of the Act, demonstrate that it is economically and politically unacceptable to force a reduction in traffic levels so as to conform with an optimum Conrail plant, even if such optimum plant could be created.

The experience with the Penn Central disaster -- a merger so thoroughly praised by the reviewing courts^{12/} -- suggests that weight should be given to experts challenging the viability of Conrail today, whereas those warning of a Penn-Central disaster not/ were favored by the reviewing courts.

II. THE RAILROADS ARE REORGANIZABLE ON AN INCOME BASIS WITHIN A REASONABLE TIME UNDER SECTION 77.

As mentioned, we are challenging the constitutionality of section 207(b) as applied in certain situations, because of the delegation by Congress of "public interest" matters to reorganization courts. The term of art, "reorganizable on an income basis within a reasonable time under section 77", does not mean dismissal of a proceeding with a negative answer, for the standard of section 77(g) is "undue delay". We point out this difference, because many seem to indicate that a negative finding infers that reorganization under section 77 would be impossible.

^{11/} Ibid at p. 248.

^{12/} 259 F. Supp. 964 (SDNY 1966), 386 U.S. 372 (1967); 272 F. Supp. 513 (MD Pa. 1967) and 279 F. Supp. 303 (SDNY 1967), 389 U.S. 486 (1968).

As best we can determine, the phrase "reorganizable on an income basis within a reasonable time under section 77" derives from In Re Third Avenue Transit Corp., 198 F. 2d 703, 706 (2d Cir. 1952), "That the debtor can be reorganized in accordance with the Act, within a reasonable time". However, the standards of Third Avenue Transit do not govern dismissal of a proceeding, or a holding that reorganization is impossible, but are standards governing the issuance of trustees certificates which would supersede existing mortgage liens. Of course, Third Avenue Transit has the further distinction that it was a Chapter X case, and not a section 77 proceeding.

We attach hereto our post-hearing memorandum on the 180-day hearing,^{13/} in which we contend that Penn Central should not be reorganized under the act on the ground that it is reorganizable on an income basis within a reasonable time under section 77 and that the public interest would be better served by such a reorganization than by a reorganization under Regional Rail Reorganization Act of 1973.

Lehigh Valley entered reorganization on its petition seeking reorganization in connection with the plan of reorganization for Penn Central. If Penn Central is "reorganizable" within the meaning of section 207(b), it follows that Lehigh Valley is most likely so reorganizable.

Central Railroad Company of New Jersey has the option of seeking inclusion in the Chessie System, in accordance with the procedures set forth in Chesapeake & O. Ry. Co.-Control-Western Maryland Ry. Co., 328 I.C.C. 684 (1967), as modified by order of February 23, 1968. Reading Company has the same opportunity.

- 10 -

^{13/} The record certified to this court by USRA does not appear sufficient. For example, also missing is the USRA post-hearing brief. See: Amici Curiae brief at fn. 40.

Lehigh & Hudson River has no mortgages on its property. The carrier is actually a joint facility, and is clearly reorganizable.

CONCLUSION

The decisions of the Penn Central, Lehigh Valley, CNJ and Lehigh & Hudson River reorganization courts that the estates shall not be reorganized pursuant to the Act, should be affirmed.

Respectfully submitted,

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AUGUST 1974

Certificate of Service

I hereby certify that I have this 20th day of August, 1974,
served 2 copi^{/es} of the foregoing upon counsel for all appellants,
and for all known appellees, by first class mail postage-prepaid.

Washington, D.C.

Gordon P. MacDougall

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of	:	In Proceedings for the
	:	Reorganization of a
PENN CENTRAL TRANSPORTATION	:	Railroad
COMPANY,	:	
Debtor.	:	Bank. No. 70-347

POST-HEARING MEMORANDUM ON BEHALF
OF COMMONWEALTH OF PENNSYLVANIA

Commonwealth of Pennsylvania submits this memorandum concerning the so-called "180-day" findings set forth in section 207(b) of Regional Rail Reorganization Act of 1973, 45 U.S.C. 717(b). The new law, enacted January 2, 1974, specifies that this court shall determine on or before July 1, 1974, whether Penn Central Transportation Company should be reorganized by transferring some of its rail properties to Consolidated Rail Corporation ("Conrail"), pursuant to the process of the Act. In short, the court is to determine if Penn Central should be reorganized pursuant to the new law.

Governor Milton J. Shapp strongly opposed the new law when it was before the U.S. Congress in the fall of 1973, favoring instead alternative legislation (sponsored by Senator Vance Hartke), which would have provided for the planning process for restructuring the bankrupt railroads, together with interim funds to maintain the railroads operational during the planning process, but which would not have required railroads to elect whether to come under the plan until the plan became known, and until further implementing legislation was provided by the Congress in light of the study results. ^{1/}

It light of major developments subsequent to January 2, 1974, which include administration of the Act by the U.S. Depart-

^{1/} See: Hearings on S. 1031, Northeastern Railroad Transportation Crisis, 93rd Cong., 1st Sess. U.S. Senate, Ser. No. 93-8, pp. 162-204; Hearings on S. 2767, 93rd Cong. 1st Sess. U.S. Senate (Nov. 1973).

ment of Transportation, and the 10% increase in freight rates^{2/} announced June 4, 1974 by the Interstate Commerce Commission, it is recommended that the court rule that Penn Central be not reorganized under Regional Rail Reorganization Act of 1973, so long as the Act remains in its present form. The matter should be returned to the Congress. Meanwhile, the court should proceed in an attempt to reorganize the railroad under pre-existing law. Specifically, we request the court to find, in accordance with the third sentence of section 207(b) of the Act, that Penn Central is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act and that the public interest would be better served by such a reorganization than by a reorganization under Regional Rail Reorganization Act of 1973.

The basis for this recommendation is that it would better preserve railroad freight service to the citizens and businesses of Pennsylvania. Operation of the new law has placed a considerable portion of Pennsylvania's rail service in jeopardy. On the other hand, the recent 10% increase in freight rates is projected to give Penn Central an additional \$160 million per year in revenue, which would virtually wipe out the railroad's annual loss, thus giving a reasonable prospect of reorganization outside the new law.

The following major developments have transpired in connection with the new law:

1. D.O.T. Report. The U.S. Secretary of Transportation on February 1, 1974 issued his report recommending the zones within and between which rail services should be provided. This report listed 25% of the railroad mileage in the Midwest and Northeast as "potentially excess". Some 1,450 route miles of such "potentially excess" line are in Pennsylvania. This report has been given prima facie status of what lines will be included in the final system plan for purposes of financial assistance by the U.S. Secretary of Transportation under section 215 of the

^{2/} Ex Parte No. 305, Nationwide Increase of Ten Percent in Freight Rates and Charges, 1974.

Act, 45 U.S.C. 725.^{3/} The reduction in rail service set forth in the February 1, 1974 report is unacceptable to Pennsylvania.

2. I.C.C. Report. The Interstate Commerce Commission on May 2, 1974 issued its evaluation of the D.O.T. report.^{4/} The I.C.C. had conducted hearings in March, 1974 throughout the Midwest and Northeast regarding the D.O.T. report.^{5/} The I.C.C. stated:

"The general outcry against such an anticipated action should convince government planners and policy makers alike that the public is not willing to accept any proposal resulting in massive abandonment of rail service while ignoring the social, environmental, and economic costs of such an action, and not providing the opportunity for full public hearing."

The public response to the D.O.T. report clearly shows that the planned cutbacks in rail service are unacceptable from an economic and political standpoint.

3. United States Railway Assn. A serious deficiency in performance under the new law has been that of the United States Railway Association, the principal planning body. U.S.R.A. will prepare the preliminary and final system plan, and the law provides that the preliminary plan shall be submitted within ~~180~~ (300) days from January 2, 1974, or on or about October 28, 1974. However, the Board of Directors has not been installed. The law provides that subsequent to March 17, 1974 the Board must have at least three non-governmental members to constitute a quorum. A quorum has been lacking. The President of the United States did not announce nominations until May 30, 1974, and the nominations have not been confirmed by the U.S. Senate as of this date. Thus, the period for planning the preliminary system plan is at about mid-stage, yet U.S.R.A. is not in effective operation.

Moreover, the House-Senate conferees contemplated that this court's so-called "180-day" decision would be assisted by "study

^{3/} See Grant Agreement underlying Order No. 1542 (April 30, 1974).

^{4/} The D.O.T. and I.C.C. reports are specified by sections 204(a) and 205(d) of the law. 45 U.S.C. 714(a), 715(d).

^{5/} The hearings in Pennsylvania were held at Pittsburgh, Philadelphia and Scranton. A total of 514 witnesses testified at these Pennsylvania hearings, virtually all in opposition to the D.O.T. report.

information and preliminary planning endeavors" of U.S.R.A.^{6/}
However, U.S.R.A. was unable to provide the court with any such data or information. (Tr. 12,506-8).

4. Deficiency Judgment. Various major creditors, joined by the trustees themselves, have urged that the U.S. Court of Claims can enter a deficiency judgment against the United States in the event the financial support provided by the new law is insufficient to compensate the creditors for the conveyance of Penn Central's properties to Conrail. The potential liability of the U.S. Treasury is measured in the billions of dollars. This liability appears contrary to the intent of Congress in enactment of the law. (Tr. 12,504-6). However, clarification by the Congress would be helpful.

We oppose Regional Rail Reorganization Act being used to bail out Penn Central's creditors.

5. Freight Rate Increase. A very favorable development to the financial viability of Penn Central is the 10 percent freight rate increase approved by the I.C.C. on June 4 to become effective June 19, 1974. Originally estimated to produce an additional \$170 million in revenue,^{7/} Penn Central after approval indicates a \$160 million figure. Clearly, the magnitude^{8/} of the revenue increase requires the court to examine its May 2, 1974 finding that Penn Central is not reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act. The net income(loss) for Penn Central in 1973 was \$172.5 million, which included \$135.1 million in fixed charges. The monthly ending cash balance projected for year-end 1974 is shown as a \$17.0 deficit in this court's May 2, 1974 memorandum. However, Penn Central has revised this upward to a positive \$47 million. (Tr. 12,490). The carrier expects an additional \$88 million during the balance of the year as a result

6/ Conference Report on H.R. 9142, at p. 52. H.Rept. No. 93-744.

7/ Ex Parte No. 305. V.S. Langdon (No. 13), dated April 15, 1974.

8/ The I.C.C. staff analysis indicated no more than 3 percent was justified. See: Statement of Commissioner O'Neal.

of the freight rate increase. (Tr. 12,491)

While the 10 percent freight rate increase is not the complete answer, to Penn Central's difficulties, it does shed new light on Penn Central's ability to reorganize outside the new law.

ARGUMENT

- I. THIS COURT'S EARLIER DETERMINATION THAT THE RAILROAD IS NOT REORGANIZABLE UNDER SECTION 77 OF THE BANKRUPTCY ACT IS REVIEWABLE AT THIS TIME.

This court on May 2, 1974 found that Penn Central "is not reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act, within the meaning of section 207(b) of the Regional Rail Reorganization Act of 1973." The court stated, erroneously, that its conclusion as to reorganizability was "in accordance with the views expressed by every participant in the hearings."^{9/} The court declined to make a "public interest" finding as also specified in the first sentence of section 207(b).

The second and third sentences of section 207(b) are addressed to the so-called "180-day" findings:

"Within 60 days after the submission of the report by the Office, under section 205(d)(1) of this title, on the Secretary's report on rail services in the region, each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to the Corporation pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding."

^{9/} Commonwealth of Pennsylvania did not support that view. It stated, "...it is hoped that Penn Central could reorganize under section 77 within a reasonable time on an income basis, which would be in the public interest". (Pa.Brief, 3/18/74).

The findings required under the first sentence of section 207(b) are not identical with clause (1) of the third sentence of section 207(b), ^{10/} thus suggesting an independent analysis of reorganizability and "public interest" at this time. However, the reviewability of the court's earlier "120-day" findings of May 2, is also supported by the opinion of the Special Court, entered May 24, 1974, at pp. 8-9:

"If a district judge who has returned a negative answer to one or both of the questions put in the first sentence of section 207(b) should adhere to that position, this will be the predicate for an order directing reorganization under the Act unless a judge finds that the Act does not provide a process fair and equitable to the estate."

As indicated, the Special Court infers that a court may not "adhere" to its "120-day" findings.

By whatever manner the first and third sentences are viewed, the court should make a current assessment as to whether the railroad is reorganizable on an income basis within a reasonable time under section 77, together with the public ^{11/} interest finding. This is especially important in view of the substantial projected increase in revenues brought about by the 10 percent freight rate increase.

The court is requested to find at this time that Penn Central is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act and that the public interest would be better served by such a reorganization than by a reorganization under Regional Rail Reorganization Act of 1973. As pointed out in our Supplemental Memorandum of April 1, 1974, a balancing is necessary between the two elements of reorganizability and public interest, and that the two findings should be consistent.

^{10/} The final portion of the first sentence reads, "by continuing the present reorganization proceedings than by a reorganization under this Act". Clause (1) of the third sentence, as pertinent, reads somewhat differently, "by such a reorganization than by a reorganization under this Act."

^{11/} Such current assessment is also supported by the "Columbus Option" decision. In Re Penn Central Transportation Company, 494 F. 2d 270, 282 at fn. 9. (1974).

II. THERE IS NO REQUIREMENT THAT THE PROCEEDING
BE DISMISSED IN THE EVENT THE ACT DOES NOT
PROVIDE A PROCESS WHICH IS FAIR AND EQUITABLE
TO THE ESTATE.

Solely to protect the record, for the court need not reach the point if it finds Penn Central can be reorganized under section 77 and that the public interest would be better served by doing so, we urge that the court not dismiss the proceeding in the event the court finds to the contrary and that the process of the Act is not fair and equitable to the Penn Central estate.

The Penn Central trustees suggest that the process of the Act is not fair and equitable to the estate, unless the Supreme Court hereafter determines that an action can be maintained in the Court of Claims to recover any deficiency resulting from the taking of Penn Central properties pursuant to the process of the Act.

The Penn Central's concern is with creditors, whereas our concern is with continued rail operations.

We ask that any order entered as suggested by Penn Central be stayed pending judicial review, and further consideration by the U.S. Congress. Section 207(b) does not speak of time of dismissal

Again, to protect the record, we respond to the suggestion conveyed in the I.C.C.'s memorandum to this Court that dismissal of the proceedings (bringing on an equity receivership) would result in cessation of operations or in different regulatory consideration by the I.C.C. of abandonments. We disagree. While dismissal of a proceeding under section 77(g) might result in liquidation under an equity receivership, and relaxed standards by the I.C.C. in passing upon discontinuances, the situation is different with a dismissal under section 207(b). In the event of a dismissal under section 207(b), we believe the conventional equity proceedings prior to enactment of section 77 in 1933 would be applicable. There can be no presumption of failure under section 77 at this time, because this court and the I.C.C. have not gone through the necessary

procedures to make an "undue delay" finding, and consultation with the I.C.C. as required by section 77(g). The "within a reasonable time" under section 207(b) of the new law is not the equivalent of the considerations required in evaluating whether to dismiss a section 77 reorganization under 77(g).

Under a conventional equity receivership, a plan of reorganization would be devised, subject to certain I.C.C. jurisdiction in section 20a of the Interstate Commerce Act. Abandonments would be subject to section 1(18), and sales of lines subject to section 5(2).

III. THE ACT AS APPLIED TO PENN CENTRAL WOULD DEPRIVE PENNSYLVANIA OF DUE PROCESS.

This proceeding has been governed by section 77 of the Bankruptcy Act. Pennsylvania has claims against Penn Central, and Pennsylvania has a strong interest in adequate railroad transportation. A section 77 proceeding can be dismissed only after a finding of "undue delay", and prior consultation with the I.C.C., as set forth in section 77(g). The dismissal of a section 77 case heretofore has been considered a last resort.

The new act says that the section 77 proceeding should be dismissed if reorganizztion under the new act would constitute a process which would be unfair and inequitable to the Estate. The only additional requirement, found by this court on May 2, is that Penn Central is not reorganizable on an income basis within a reasonable time under section.

The finding of the first sentence of section 207(b) is simply not equivalent to a finding of "undue delay" requiring the drastic remedy of dismissal of the proceeding.

As best we can determine, the phrase "reorganizable on an income basis within a reasonable time under section 77" would seem to derive from the language in In Re Third Avenue Transit Corp., 198 F. 2d 703, 706 (2d Cir. 1952), "That the debtor can be reorganized in accordance with the Act, within a reasonable time". Footnote 10 adds, "This means, of course, a plan which will be feasible as well as fair and equitable." However, the

standards of Third Avenue Transit do not govern the dismissal of a proceeding, but are standards for the issuance of trustee certificates which would supersede existing mortgage liens. Of course, Third Avenue Transit has the further distinction that it was a Chapter X case, rather than a section 77 proceeding.

Congress has taken away substantive rights in an on-going section 77 proceeding without regard for due process. Moreover, as applied to this Penn Central proceeding, the "public interest" finding is entirely avoided.

Respectfully submitted,

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June 20, 1974

Attorneys for Commonwealth of
Pennsylvania

**SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973**

IN RE:

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HEARING

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The above entitled matter came on for a hearing before the Honorable Henry J. Friendly, Presiding Judge, and the Honorable Carl McGowan and the Honorable Roszel C. Thomsen, on Wednesday, August 28th, 1974, at 9:00 A.M.

Reported by:-
E. Edward Richardson
Official Court Reporter
United States District Court
301 United States Courthouse
111 North Calvert Street
Baltimore, Maryland 21202
539-0034

attention at the June 6th hearing and Judge Ward took it as a matter of fact that this has seriously hurt the railroad through loss of traffic so, Your Honor, I bring those few points to you for the purpose of information and I think that Judge Ward made a prudent decision and I feel that under the circumstances on the question of erosion he has to be substantiated. All the other legal arguments, I have nothing more to say about, Your Honor.

MR. MACDOUGALL: Gordon MacDougall, for the Commonwealth of Pennsylvania. We have nothing to add that is not already in our brief. I would just point out that in this case as in all of the others we have taken appeals on the jurisdiction of the reorganization court to the respective courts of appeal. IN this case it was to the Second Circuit.

JUDGE FRIENDLY: Anyone else?

MR. DAUSCH: Your Honor, maybe I should point out one thing in light of what Mr. Smith said. I would like to have seen that in a brief. Of course, he did not file one, but his position below was to support reorganization under the Act.

JUDGE FRIENDLY: Anyone else? One question that Mr. Smith's reference to tax matters, which really has nothing to do with your case, Mr. Smith, but I would like to ask Mr. Cutler and Mr. Horsky what happens to the large

Act be made available to Reading whereby Reading's property could be acquired by Chessie in a way other than through the inclusion proceedings. The case made for Reading was, they felt, the Reading trustees, that their property would be more attractive to the C and O - B and O if it could be run through the regional railway reorganization act of '73.

Our position has been that the Reading should aggressively petition or follow up its petition for inclusion in the Chessie System because it would all be included whereas under the procedures of this act, presumably, the final system plan would only allow -- would only require -- let's say make permissive would be even better that Chessie pick up certain lines of the Reading and this --

JUDGE FRIENDLY: Isn't that apparent from the fact that the matter was finally held that the procedures of the Act were not fair and equitable so far as Penn Central is concerned, nobody is going to want to pursue anything.

MR. MacDOUGALL: Well, no, that's -- no, the Reading took the position at the 180 day proceedings where at that time everybody --

JUDGE FRIENDLY: I'm saying that it was --

MR. MacDOUGALL: Well, I'm urging that it was.

The position of the Reading was, okay, let's have Penn Central stay out, it might still be very attractive for N and W or C and O, particularly C and O, to use this device to acquire portions of the Reading which they would like and the Reading made it very clear to them at the 180 day hearing that if the Act were held invalid as to Penn Central or if Penn Central didn't want to go into Conrail, why, Reading stood ready, willing and able and they urged their Court to do that and, if you will notice, Judge Ditter has bought that reasoning. In his opinion he says that Connecticut General has pretty well made a shambles of the act, but it may still be a benefit to the Reading and we are urging on -- we don't like that approach, because there is this inclusion and we would like to see all of the railroad's properties included in the Chessie System and then if they want to apply for abandonments in the ordinary techniques and ordinary methods of filing at the I.C.C., they may do so.

JUDGE THOMSEN: You're trying to prevent abandonments, aren't you?

MR. MacDOUGALL: That's a major factor, yes, sir, and also competition. The other thing we don't like is that we would not like to see the Reading and the Penn Central in the same system.

See, one of the major problems with this Act that

we had was one huge Conrail. In other words, a super Penn Central and, if you noticed, the press release of USRA started talking about multi-Conrails. It didn't say multi-competitive Conrails but I am suspecting, I am suspicious their consultants are coming up with the same hypothesis that First National City has that Conrail won't work so we are interested in the abandonment feature and we are also interested in the competitive situation. If Reading and Penn Central would both be in one system, you'd have a virtual monopoly of rail transportation in eastern Pennsylvania and we had a witness who testified as to this, as to the reasons why we didn't want to see Reading and the Penn Central in the same system so, basically, our position is that there is an avenue whereby Reading can be reorganized.

They are projected to have net railway operating income anyway.

It can be reorganized outside the act and certainly if Penn Central stays out, why, Reading should stay out.

Reading's justification for coming under the act was that Penn Central, going into Conrail, would be so strengthened that Reading couldn't survive outside Conrail. That was their justification.

I noticed we had a little reply brief on that.

They have kind of modified their position since they are here but below their justification for going into the act was we can't survive competition with Conrail with Penn Central in Conrail.

Now, if Penn Central doesn't go into Conrail the justification for the Reading going under the act I think pretty well follows. I mean stops.

Now, we have taken in this case, as was in the others, jurisdictional appeals on the constitutional issue to the Third Circuit.

Our position is that's on the public interest criteria which delegated this to the reorganization courts and we are asking, naturally, that this Court here not pass on that jurisdictional contention.

Our view, as we stated in our brief, the judicial panel of multi-district litigation was requested very strongly by USRA and the Government to consolidate the constitutional cases with this case and they decided not to do so.

JUDGE THOMSEN: Well, you say the constitutional cases. It was those three or four, wasn't it?

MR. MacDOUGALL: That's right. There were four of them at that time, Judge Thomsen.

JUDGE THOMSEN: Well, they have been decided, haven't they?

MR. MacDOUGALL: Yes, they have. The other ones, the appeals which were taken alleging that the constitution doesn't permit the reorganization court to have jurisdiction, those appeals were taken by the New Haven trustees and ourselves and the Third Circuit has held argument on the 120 day appeals, decided not to do anything, and said they would wait for guidance from the U. S. Supreme Court in the pending Connecticut General case.

The 180 day appeals have been docketed but they have not been scheduled for anything in the Third Circuit. That's the question on the public interest, because the reorganization courts were very reluctant to make findings on the public interest in the first part of the first sentence, actually the second part of the first sentence of the statute, didn't want to get into it. They felt there may be a constitutional question. You will notice Judge Fullam did that, he didn't want to rule on the public interest so here we are now and there has been no ruling except in the secondary debtor cases on the public interest. It's a question of jurisdiction, and I just wanted to point out we have --

JUDGE THOMSEN: Isn't the jurisdiction given to us to hear appeals from the 120 day hearing? Didn't we say we could consider the questions raised by those appeals at this time?

MR. MacDOUGALL : Well, we agree, in this case, yes, you are, in the Reading case.

In the other cases, of course, the Court found our way. That is they agreed or ruled that the various railroads should not transfer properties to Conrail so therefore we agree with that result but it wasn't necessary to get the public interest in those other cases.

The question comes should you reverse any of the Courts below on the fair and equitable process situation, what happens then, concerning the public interest.

JUDGE THOMSEN: Well, we have power to do that.

MR. MacDOUGALL: Huh?

JUDGE THOMSEN: Don't we have power to do that?

MR. MacDOUGALL: Yes, but the public interest is before you but in a very oblique way. It wasn't assigned to the notice of appeal because we weren't appealing it because we were happy. I just point out this problem we have raises a jurisdictional question, the same as you find in the secondary debtors indenture trustees' brief, I think, at the end, where they were claiming that the Court did not have jurisdiction on the public interest question in the secondary debtor cases, our arguments are similar to theirs.

If you want to get into the jurisdictional thing, the complete record is before you in the Reading case.

We have filed all the pleadings on jurisdiction and everything is before you certified here in the Reading proceeding.

JUDGE FRIENDLY: All right. Now, we will hear from, I guess, the state of New Jersey would be a good one to hear next.

MR. LEVY: Your Honor, the State has waived oral argument in the Reading matter.

JUDGE FRIENDLY: All right. Then who's next.

MR. CUMMINGS: Your Honors, I am Clark Cummings representing Manufacturers Hanover as indenture trustee.

JUDGE FRIENDLY: Yes, sir.

MR. CUMMINGS: As you know, we are appealing from the 180 day determination by Judge Ditter in which he was unable to find that it was not fair and equitable as far as the Reading was concerned, but before I discuss that just a word, if I may, on the 120 day determination. There, Judge Ditter found that the Reading could not be reorganized on an income basis irrespective of Conrail and he also went on to conclude that it could not be reorganized under section 77 on any basis at all. That is he considered the things that have been referred to here, possible inclusion in other systems and the reduction of the Reading to a core system and so on.

Now, as to his 180 day determination, concerning

